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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-841

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the United States

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays that this Honorable Court not issue a Writ of Certiorari to review the judgment of the Missouri Court of Appeals, St. Louis District, entered in the action on August 5, 1975, which became final on denial of the Defendant-Appellant's Application for Transfer to the Missouri Supreme Court on November 10, 1975.

OPINIONS BELOW

The Opinion of the Circuit Court of the City of St. Louis, Missouri, is reprinted in Petitioner's Appendix E and the Opinion of the Missouri Court of Appeals, St. Louis District, is

reprinted in Petitioner's Appendix H, same being styled *Lester Fulton, Respondent v. International Telephone & Telegraph Corp., Appellant,* Missouri Court of Appeals, St. Louis District, Division 2, 528 S.W. 2d 466.

JURISDICTION

Petitioner has not come within the purview of 28 U.S.C. § 1257(3) and accordingly, this Court is without jurisdiction to issue petitioner's Petition for Writ of Certiorari. Respondent, in support of his aforesaid position, states that the decision of the Missouri Supreme Court in the instant matter was devoid of any federal questions of substance that have not heretofore been determined by this Court or decisions that have been decided in a way probably not in accord with applicable decisions of this Court.

The Circuit Court, City of St. Louis, Missouri, entered judgment against the defendant on September 28, 1973, by default in the amount of $21,000 actual damages and $75,000 punitive damages, plus costs. On February 4, 1974, long after the expiration of time for filing an appeal, the defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, alleging, among other things, that the judgment was void because it violated the defendant's right to due process of law under the Fourteenth Amendment to the United States Constitution. It was respondent's contention that defendant had more notice to appear and defend at a hearing held on June 28, 1973, to prove up the plaintiff's damages, than has ever been required by the United States Constitution; that the aforesaid judgment was entered according to the procedural and substantive law of the State of Missouri on causes of action properly pleaded and of which defendant had notice. On September 19, 1973,

the Circuit Court of the City of St. Louis, Missouri, entered an Interim Order of Court indicating that judgment would be entered against defendant on September 28, 1973, in the aforesaid amount; that on September 26, 1973, the Circuit Court of the City of St. Louis, Missouri, by Court Memorandum to defendant, stated in writing the aforesaid action to be taken by the said Court; that thereafter, on September 28, 1973, the aforesaid judgment against defendant was, in fact, entered and a copy of said Entry of Judgment was mailed to defendant on September 28, 1973, and received by defendant on October 2, 1973; that defendant filed its Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, on November 14, 1973, and its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, on February 4, 1974, and that a hearing was had on same on February 7, 1974; that on February 20, 1974, defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, was overruled. Thereafter, on March 1, 1974, defendant appealed the said Court Order overruling defendant's Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, and on March 22, 1974, also appealed directly from the judgment as entered on September 28, 1973. Plaintiff and defendant were required to both brief and argue both said appeals. On August 5, 1975, the Missouri Court of Appeals, St. Louis District, entered its Opinion dismissing the appeal from the judgment and affirming the decision of the Trial Court overruling defendant's said Motion to Set Aside Judgment and to Quash Execution, and Petition for Review. On August 19, 1975, defendant filed its Motion for Rehearing or Transfer to the Court En Banc. Same was denied on September 8, 1975. On October 11, 1975, defendant filed its Application for Transfer of the said appeals (now consolidated) to the Missouri Supreme Court and on November 10, 1975, said Application was denied.

This Brief in Opposition to petitioner's Petition for Writ of Certiorari has been filed within thirty (30) days of the date of service on respondent of said Writ as required by Rule 24, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Whether petitioner was denied the right to due process of law under the Fourteenth Amendment to the Constitution of the United States when:

(a) Said petitioner was duly served with process in a suit instituted in the Circuit Court, City of St. Louis, Missouri; and

(b) Said petitioner was afforded every opportunity required by law, and additional opportunities not required by law, to defend such suit, to move to set aside judgment and/or to file a timely notice of appeal, but deliberately elected not to do so; and

(c) Said petitioner, although out of time, was permitted to brief and argue the suit on its merits; and finally,

(d) The judgment on said suit was rendered within the prayer of the pleadings and within the scope of the pleadings.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case of petitioner with the following exceptions and additions:

The "memorandum" requested of plaintiff's counsel by Judge Scott [T. 52/Petitioner's Appendix D/Exhibit A] was, in fact, prepared and delivered to Judge Scott by plaintiff's counsel on

the same date as the evidentiary hearing of June 28, 1973 [T. 55].

Respondent believes that this Court's time can best be utilized by the expediency of setting out the chronology of the events and dates thereof relative to this lawsuit, all of which ultimately led to this Petition for Writ of Certiorari.

Accordingly:

Prior to Evidentiary Hearing of June 28, 1973

March 15, 1973 Petition filed against defendant in Two Counts alleging a claim for relief under Section 290.140, R.S. Mo., Count I seeking actual damages in the amount of $21,000 and Count II seeking punitive damages in the amount of $100,000 [T. 1-3/Petitioner's Appendix A].

March 16, 1973 Registered Agent of defendant personally served (C. T. Corp.) [T. 7].

June 5, 1973 Certified letter from plaintiff's counsel to Mr. Robert Bucci, attorney and house counsel for defendant, advising that unless an entry of appearance or pleading was filed by defendant within one (1) week from date, plaintiff would have no alternative but to take a default [T. 13-14/Respondent's Appendix A].

June 7, 1973 Date on Return Receipt of aforesaid certified letter [T. 14].

June 13, 1973 Plaintiff granted default and inquiry by Circuit Court.

June 28, 1973 Evidentiary hearing on default, and filing on same date, by plaintiff, of "memorandum" [Petitioner's Appendix D/Exhibit A] requested by Judge Scott.

Subsequent to Evidentiary Hearing of June 28, 1973

September 19, 1973 Interim order of Circuit Court was entered in the Record indicating judgment to be entered against defendant on September 28, 1973, which said interim order indicated the amount of damages in both Counts, to wit: $21,000 actual damages on Count I, and $75,000 punitive damages on Count II [Respondent's Appendix B].

September 26, 1973 The Circuit Court sent a copy of the aforesaid interim order to defendant [T. 172-173/Respondent's Appendix B] same bearing postmark of September 26, 1973 [T. 174] and same being received by house counsel, specifically, Mr. Robert Bucci, on October 1, 1973 [T. 174].

September 28, 1973 Circuit Court's entry of judgment in accordance with the interim order referred to previously [Petitioner's Appendix B].

October 2, 1973 The defendant received a copy of the Circuit Court's entry of judgment on both Counts, in accordance with said Court's interim order [T. 174-175].

November 9, 1973 Transcript of telephone conversation with Mr. Robert Bucci, attorney and house counsel for defendant [T. 106-109/Respondent's Appendix C]; and, accompanying Affidavits of JoAnn Saputo [T. 106-108/Respondent's Appendix C/Exhibit 1], secretary to the attorneys for plaintiff, and Ross G. Lavin [T. 109-110/Respondent's Appendix C/Exhibit 2], and Daniel C. Aubuchon [T. 109-110/Respondent's Appendix C/Exhibit 3], two of plaintiff's attorneys, attesting to the contents of said conversation.

November 14, 1973 Defendant filed its Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 58-67/Petitioner's Appendix C].

November 15, 1973 Defendant filed its Motion to Stay Execution [T. 56-57].

February 4, 1974 Defendant filed its First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 68-95/Petitioner's Appendix D].

February 6, 1974 Plaintiff filed his Answer to defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 97-105/Respondent's Appendix D].

February 7, 1974 Evidentiary hearing on defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 112].

February 20, 1974 The Circuit Court, Judge Buder, overruled defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 192] and filed a "court memorandum opinion" [T. 192-194/Petitioner's Appendix E].

Thereafter, the defendant appealed Judge Buder's order of February 20, 1974, and the following dates and events relative thereto are hereinafter set out:

March 8, 1974 Defendant filed a Motion for a Special Order to file a Notice of Appeal Out of Time in the Missouri Supreme Court which said Motion was transferred to the Missouri Court of Appeals, St. Louis District [Petitioner's Appendix F and G].

April 4, 1974 Respondent filed his Motion to Dismiss this appeal with Suggestions in Support of same [Respondent's Appendix E].

August 5, 1975 The Missouri Court of Appeals, St. Louis District, rendered its Opinion [Petitioner's Appendix H] affirming the February 20, 1974, Order and dismissing the defendant's direct appeal from the default judgment of September 28, 1973 [Petitioner's Appendix H].

August 19, 1975 Defendant filed its Motion for Rehearing [Petitioner's Appendix I].

September 8, 1975 Defendant's Motion for Rehearing was denied [Petitioner's Appendix J].

October 11, 1975 Defendant filed its Application for Transfer of the Consolidated Appeals to the Missouri Supreme Court [Petitioner's Appendix K].

November 10, 1975 The Missouri Supreme Court denied defendant's Application for Transfer of Consolidated Appeals [Petitioner's Appendix L].

REASONS FOR DENYING THE WRIT OF CERTIORARI

The issue in the instant matter is narrow and unique to its facts. Simply stated the issue can be succinctly stated as follows: Was the defendant denied due process of law as required by the Fourteenth Amendment to the United States Constitution? Clearly, this is not true. Petitioner's allegation that the Missouri Court of Appeals, St. Louis District, "affirmed the Circuit Court's holding that the denial of due process present in this case did not constitute legal grounds for relief from the judgment" [Petitioner's Brief, Pg. 7] is completely and totally unfounded. Nowhere in said Opinion [Petitioner's Appendix H] is there a scintilla of reference to the defendant's having been denied due process. To the contrary, the Record in this case is replete with facts substantiating that plaintiff and the Courts of the State of Missouri gave defendant more due process than has ever been required by the Fourteenth Amendment to the United States Constitution.

Defendant's contention that the Missouri Court of Appeals, St. Louis District, dismissed its appeal on the merits without regard to the validity of the judgment is without merit. Despite the fact that the defendant was not within the purview of Rule 81.07, Missouri Rules of Civil Procedure [Respondent's Appendix F] relative to untimely appeals, the said Court permitted such an appeal and required the parties to brief and argue same. By permitting this appeal on the merits, the said Appellate Court, in subsequently dismissing said appeal as having been "improvidently granted", implicitly determined that, on the merits, the judgment was not void; that the judgment was not based on an alleged de facto amended petition; that the defendant had not been denied the due process required by the Fourteenth Amendment to the United States Constitution; that being a valid judgment, defendant, in order to prevail on a direct, untimely appeal from the judgment, must

of necessity, come within the purview of Rule 81.07, Missouri Rules of Civil Procedure [Respondent's Appendix F]. At this time, and only after the above consideration, defendant's appeal from the judgment was dismissed.

There can be no question but that the Courts below had jurisdiction of the parties and the subject matter. The Petition was filed in Missouri, and the defendant was duly served with process, the incredible and almost indescribable negligence of house counsel for defendant required plaintiff's counsel, in plaintiff's best interest, to take a default judgment. This negligence persisted until the judgment became final and the time for filing timely after-trial motions and notices of appeal had expired. Our Courts have consistently held that the negligence of an attorney is imputed to his client. *Casper v. Lee*, 245 S.W. 2d 132 (Mo.Sup.Ct. En Banc, 1952).

The Missouri Appellate Courts have consistently held that the Missouri Service Letter Statute [Petitioner's Brief, Pg. 4] is intended to protect citizens of the State of Missouri who are employed in the State of Missouri regardless of whether the employer is a Missouri corporation, or a foreign corporation authorized to do business in Missouri. In *Horstman v. General Electric Company*, 438 S.W. 2d 18 (K.C.Ct.App., 1969), the Court states at Page 20:

> "We think the language 'whenever any employee of any corporation doing business in this State . . .' means an employee working in Missouri for a corporation doing business in Missouri. . . ."

Regarding the sufficiency of the pleadings, a cursory glance at plaintiff's Petition [Petitioner's Appendix A] reveals unequivocally that plaintiff stated a cause of action against the defendant.

That the evidence was sufficient to sustain the judgment is also quite clear. Petitioner, throughout this litigation, has been

insisting it is omniscient and can read the mind of the Trial Court. Petitioner has attempted to set out the reasons and reasoning employed by the Trial Court in arriving at its conclusion relative to the amounts of the judgment. Petitioner attempts to ferret out isolated matters of evidence and imply that the Court relied on certain specific items of evidence in arriving at its decision. Respondent respectfully suggests that the Trial Court heard the testimony at the June 28, 1973, hearing [T. 3-54], read respondent's "Memorandum" of June 28, 1973 [Petitioner's Appendix D/Exhibit A], had the opportunity to evaluate the credibility of the witnesses, presumably weighed said testimony and accompanying exhibits very carefully, and presumably rendered its judgment on those portions of the credible evidence it considered relevant and material. Thus, "where the judgment is within the jurisdiction of the Court rendering same it is presumed to be valid." *Ruckman v. Ruckman*, 337 S.W. 2d 100, at Page 103 (St.L.Ct.App., 1960).

Similarly, "Judgment presumes jurisdiction over subject matter and over persons." *Trumbull v. Trumbull*, 393 S.W. 2d 82, at Page 88 (St.L.Ct.App., 1965); and, ". . . It is usually presumed that a court of general jurisdiction had jurisdiction of a cause, found all facts necessary, and took all steps necessary to enable it to render a valid judgment." *Hendershot v. Minich*, 297 S.W. 2d 403, at Page 410 (Mo.Sup.Ct., Div. 2, 1956).

Presumably, the Appellate Courts of the State of Missouri, in implicitly holding the judgment to be valid, agreed with the contention that the evidence was sufficient to sustain same.

Clearly, petitioner has had its day in Court and no amount of legal rhetoric can raise the constitutional issue of lack of due process under the Fourteenth Amendment to the United States Constitution, unless it can be said that petitioner's undue and unwarranted prolongation of this litigation is indicative of a denial of such due process to respondent simply because of the lengthy passage of time involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted

JULIUS H. BERG
611 Olive Street, Suite 1842
St. Louis, Missouri 63101

ROSS G. LAVIN
705 Olive Street, Suite 1025
St. Louis, Missouri 63101

Attorneys for Respondent-
Plaintiff

APPENDIX

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JULIUS H. [illegible]
611 Olive Street, Suite 1842
St. Louis, Missouri 63101

ROSS G. LANDE
611 Olive Street, Suite 1623
St. Louis, Missouri 63101

Attorneys for Respondent-
Plaintiff

APPENDIX A

June 5, 1973

Certified Mail
Return Receipt Requested

ITT Communications Equipment and Systems
60 Washington Street
Hartford, Conn. 06106

Attn: Mr. Robert A. Bucci, Attorney

Re: Lester L. Fulton v. ITT

Dear Mr. Bucci:

It has been almost six weeks since I spoke with you relative to the above-styled matter.

Unless an entry of appearance and/or pleading is filed in this matter within one week from this date, I shall have no alternative but to take a default.

Your courtesy and cooperation will be appreciated.

Very truly yours

ROSS G. LAVIN

APPENDIX B

"Memorandum for Clerk

"Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court will rule as follows on September 28, 1973:

"Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.

"Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

"Filed September 19, 1973.

MICHAEL J. SCOTT, Judge"

APPENDIX C

(Exhibits C-1, C-2 and C-3 attached hereto and marked as such.)

"*Bucci:* I just received a call from Western Union-telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—its not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin: It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—its final.

Bucci: Is there any way it can be opened or anything done about it?

Bucci: What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record, a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal de-

scription of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it?

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing 'we have ordered execution'.

Lavin: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

Bucci: I can see your side—I guess I screwed up but good. Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

Lavin: If I am not in, somebody will know where to reach me."

EXHIBIT C-1

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri and has been so employed since August, 1964.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 11th day of December, 1973.

/s/ Jo Ann Saputo

Subscribed and sworn to before me this . . . day of December, 1973.

. . . . . .

Notary Public

My term expires:

EXHIBIT C-2

Affidavit

State of Missouri }
City of St. Louis } ss

Ross G. Lavin, first being duly sworn on his oath states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with officers at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ Ross G. Lavin

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ Marge Rosemann
Notary Public

My term expires: Notary Public, State of Missouri, My Commission Expires Oct. 28, 1977.

EXHIBIT C-3

Affidavit

State of Missouri }
City of St. Louis } ss

Daniel C. Aubuchon, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ Daniel C. Aubuchon

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ Marge Rosemann
Notary Public

(Seal)

My term expires: Notary Public, State of Missouri, My Commission Expires Oct. 28, 1977.

APPENDIX D

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Defendant.	Cause No. 36962 Division No. 1

Answer of Plaintiff to Defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review

Comes now plaintiff in the above-entitled cause and for answer to defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review, states as follows:

1. Plaintiff admits the allegations of Paragraph 1 of defendant's Motion, but states the fact to be that the "Memorandum" filed by plaintiff was so filed on the date of, but after the hearing on, plaintiff's cause of action, and was merely for the guidance of the Court and constitutes no part of the "record proper" in this case.

2. For answer to Paragraphs 2, 3 and 4 of defendant's Motion, plaintiff denies the allegations therein set forth and states that the matters therein set forth constitute possible defenses that could have been raised by defendant in the cause of action had it filed pleadings within the time allowed. Plaintiff states that said matters alleged in Paragraphs 2, 3 and 4 of defend-

ant's Motion are not matters of which this Court can take cognizance in a Petition for Review.

3. For answer to Paragraph 5 of defendant's Motion, this plaintiff admits the sending and receipt and existence of all exhibits attached to defendant's original Motion and referred to in Paragraph 5 of defendant's Amended Motion. Plaintiff denies emphatically that said exhibits or any of them, lulled or could have lulled defendant's counsel into any false sense of security, but states the facts to be that defendant and its representatives were careless and wholly lacking in diligence in responding to the Petition and Summons served upon them in this case.

Plaintiff's counsel emphatically denies that they owed any duty to advise defendant of the status of the case after the hearing and state the fact to be that both plaintiff's counsel, in its letter of June 5, 1973, referred to in defendant's Motion and made a part of defendant's Motion, and the Court in sending defendant a memorandum of its intention to enter its judgment and a memorandum of the judgment so entered on September 28, 1973, which memorandums are incorporated in defendant's Motion, went far beyond the statutory or ethical duty in warning defendant of the consequences of their repeated failure to take any action regarding this suit pending against it and in which defendant was personally served.

Plaintiff further denies that the Clerk of this Court had any duty under Rule 74.78 of the Missouri Rules of Civil Procedure, to give any notice to defendant of the action taken by this Court or to act as loco parentis for the defendant to protect it from its own acts or slothfulness and stupidity in failing to file an answer when personally served and in failing to at least file a Motion to Set Aside the Judgment herein taken or Notice of Appeal within the proper time allowed by the Statutes of Missouri when they had adequate notice of the entry of such judgment.

4. For answer to Paragraphs 6, 7 and 8 of defendant's Motion, plaintiff denies the allegations thereof and states the facts to be that under the Statutes of the State of Missouri, in such cases made and provided, said allegations constitute no basis for either a Petition for Review or a Motion to Set Aside a Default Judgment more than thirty (30) days after its entry.

5. For further and other answer to defendant's Motion and in particular answer to defendant's allegations that its counsel could have been "misled" by any letter or conversation with plaintiff's counsel, this plaintiff alleges that on November 9, 1973, one Mr. Robert Bucci, an employee and "house counsel" for defendant, telephoned one Mr. Ross G. Lavin, one of plaintiff's counsel, in response to a telegram sent to defendant advising them that execution had been ordered on the final judgment. That said telephone conversation was taken down in shorthand by secretary for Mr. Ross G. Lavin, and is set out herein verbatim:

"*Bucci:* I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—its not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin: It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—its final.

Bucci: Is there any way it can be opened or anything done about it?

Bucci: What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it?

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing 'we have ordered execution.'

Lavin: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

Bucci: I can see your side—I guess I screwed up but good. Right now I suppose I am thinking of two things—I have been

much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

Lavin: If I am not in, somebody will know where to reach me."

Plaintiff attaches and incorporates herein by reference the Affidavit of Mrs. Jo Ann Saputo, secretary to Mr. Ross G. Lavin; the Affidavit of Mr. Ross G. Lavin, one of the attorneys for plaintiff; and the Affidavit of Mr. Daniel C. Aubuchon, associate of Mr. Ross G. Lavin, regarding said telephone conversation and has marked said Affidavits as plaintiff's Exhibits 1, 2 and 3, and incorporates the same by reference.

Wherefore, plaintiff prays that said First Amended Motion of defendant to Set Aside Judgment, Quash Execution and Petition-for-Review should be overruled for the reasons as above set out, to wit:

(a) That said Motion does not constitute Petition for Review within the purview of Rule 74.12, Missouri Rules of Civil Procedure, because defendant was personally served.

(b) That said Motion does not constitute a sufficient Petition for Review under Rule 74.32, Missouri Rules of Civil Procedure, because it does not indicate or show any irregularity on the "face of the record" that would deprive the Court of jurisdiction to enter a judgment on the "face of the record" nor does it allege any facts from the "face of the record" which would have prevented the Court from entering a default judgment.

(c) No facts are alleged which would constitute "fraud in the procurement" of the judgment.

(d) All of the matters alleged in said Motion constitute defenses which defendant might have set out in the cause of action had it not "slept on its right" and slothfully failed to file an answer and plead to the Petition which was personally served upon it.

AUBUCHON & LAVIN
/s/ ROSS G. LAVIN
Attorneys for Plaintiff
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
621-1575

State of Missouri }
City of St. Louis } ss

Ross G. Lavin, of lawful age, being duly sworn upon his oath, states that he is well and truly acquainted with all of the matters and facts in the aforegoing Answer and that the same are true to his best knowledge, information and belief, and that he verily believes the same to be true.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 6th day of February, 1974.

/s/ JO ANN SAPUTO
Notary Public

My term expires: 10/10/75.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.

No. 36962
Div. No. 1

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri and has been so employed since August, 1964.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 11th day of December, 1973.

/s/ JO ANN SAPUTO

Subscribed and sworn to before me this .... day of December, 1973.

.....
Notary Public

My term expires:

November 9, 1973

Re: Fulton v. ITT

Mr. Bucci called at 2:10 P.M. today.

B: I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—it's not your problem—I was under the impression that I had more time than I had with default judgments. I was so ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

L: It was filed back in March—like 8 months ago.

B: What can I do?

L: I don't know—it's final.

B: Is there any way it can be opened or anything done about it? What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

L: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

B: What physically happens? What have you done or what do you do?

L: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property.

It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

B: Just as a professional courtesy may I beg of you to hold off on it.

L: When will you do something?

B: I will call right now and give you the particulars.

L: We are not going to execute on anything today.

B: It said something in the thing "we have ordered execution."

L: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

B: I can see your side—I guess I screwed up but good.

Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

L: What can I say—I'm sorry.

B: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

L: If I am not in, somebody will know where to reach me.

Conversation ended at 2:20 P.M.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Defendant.	No. 36962 Div. No. 1

Affidavit

State of Missouri }
City of St. Louis } ss.

Ross G. Lavin, first being duly sworn on his oath states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ MARGE ROSEMANN
Notary Public

My term expires: October 28, 1977.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Defendant.	No 36962 Div. No. 1

Affidavit

State of Missouri } ss.
City of St. Louis }

Daniel C. Aubuchon, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ DANIEL C. AUBUCHON

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ MARGE ROSEMANN
Notary Public

My term expires: October 28, 1977.

(Seal)

APPENDIX E

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.
No. 36090.

Motion to Dismiss Appeal

Comes now Respondent-Plaintiff and moves for the dismissal of Appellant-Defendant's Appeal, and as grounds therefor, states as follows:

1. This Court is wholly lacking jurisdiction over Appellant-Defendant's Appeal for the reason that Appellant-Defendant has failed to comply with the provisions of Rule 81.07, Missouri Rules of Civil Procedure, which said Rule permits the granting of a Special Order to File an Appeal Out of Time ". . . upon a showing by affidavit or otherwise, that there is merit in the Appellant's claim for the Special Order and that the delay was not due to Appellant's culpable negligence."

2. This Court abused its discretion in granting Appellant-Defendant a Special Order to file an Appeal Out of Time, particularly in view of the Record of the proceedings in this matter in the Circuit Court, as attached to Suggestions filed by both parties relative to Appellant-Defendant's Motion for a Special Order to File an Appeal Out of Time.

3. If this Motion is overruled, Respondent-Plaintiff will have been denied due process of law and deprivation of property rights, all in violation of the Constitutions of both the United States of America and the State of Missouri by reason of having to file briefs and paying expenses of counsel to pursue the Appeal.

4. If this Motion is overruled, this Court will be in derogation of its own Rules, in such a manner and to such an extent that it will be accepting jurisdiction over that which it clearly does not have.

Wherefore, Respondent-Plaintiff prays that in the interest of justice and in the interests of giving the Missouri Rules of Civil Procedure some meaning, that the Court dismiss Appellant-Defendant's Appeal or, in the alternative, grant to Respondent-Plaintiff and Appellant-Defendant the opportunity of oral argument of this Motion at any time that may be convenient with the Court.

Respectfully submitted

/s/ AUBUCHON & LAVIN
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
Attorneys for Respondent-Plaintiff, Lester L. Fulton

Certificate of Service

The undersigned hand delivered a copy of this Motion to the office of the attorneys for Appellant-Defendant, on this 4th day of April, 1974, at 1:30 o'clock P.M.

/s/ DAVID C. AUBUCHON

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant
No. 36090

Suggestions

Comes now Respondent-Plaintiff, Lester L. Fulton, and respectfully offers the following Suggestions in Support of his Motion to Dismiss Appellant-Defendant's Appeal.

In order to assist the Court, Respondent-Plaintiff sets out in Respondent-Plaintiff's Appeal Exhibit "A", attached hereto, the chronology of events from the commencement of the cause of action to the aforesaid matters currently before this Court.

Under Rule 81.07, Missouri Rules of Civil Procedure, it is incumbent upon the Appellant-Defendant in its Motion for a Special Order to File an Appeal Out of Time, by affidavit and otherwise, to show that it was not guilty of "culpable negligence" in its delay in filing a Notice of Appeal. It is interesting to note that in this respect Appellant-Defendant, in its Suggestions in Support of its Motion for a Special Order, sets out all of the work and haste with which it had handled this matter *only after* the matter had been referred to local counsel. No mention is made of the "attention, diligence and perseverance" exercised by the Appellant-Defendant after it was served with this suit on March 16, 1973, and until the matter was referred to local counsel on November 10, 1973. The chronology of

events referred to above shows that Respondent-Plaintiff's attorney sent a certified letter to Appellant-Defendant's house counsel on June 5, 1973, notifying him that a default would be sought unless a responsive pleading was filed within ten (10) days. After the default hearing on June 28, 1973, the Court below saw fit to take the matter under submission and on September 19, 1973, entered its unusual memorandum that on September 28, 1973, the Court intended to enter a judgment for $21,000 actual and $75,000 punitive damages and had the Clerk send a copy of his Order of that date to the home office of the Appellant-Defendant and they acknowledged receiving this on October 1, 1973. Thereafter, the Court entered the judgment on September 28, 1973, and had the Clerk again send a copy of the Order entering the judgment to the home office of the Appellant-Defendant and they acknowledged receiving it on October 2, 1973. Yet, no effort was made during all that time to file a responsive pleading, to file a motion to set aside the judgment, to file a notice of appeal, or to enter appearance of any kind, or to refer the matter to local counsel until Respondent-Plaintiff wired the Appellant-Defendant on November 9, 1973, that they intended to go forward with an execution and levy on the judgment they had procured. Only then did the Appellant-Defendant galvanize itself into action by employing local counsel.

Appellant-Defendant produced at the hearing on its First Amended Motion to Set Aside Judgment one Mr. Robert Bucci, house counsel for the Appellant-Defendant. His testimony convicts the Appellant-Defendant of culpable negligence in not following the Rules of this Court. A copy of his testimony taken by the Court Reporter, previously filed herein and marked Plaintiff's Appeal Exhibit No. 1, without any measure of doubt, proves the procrastination, neglect, unreasonable inattention and inactivity, lack of diligence and most importantly, culpable negligence, of the Appellant-Defendant.

If ever a witness convicted his client of extreme culpable negligence, Mr. Bucci's testimony should resolve any doubt in this respect.

Incidentally, while a client is bound by the negligence of his attorney, it is to be remembered that Mr. Bucci was not even an independent attorney but was a full-time employee or house counsel for the Appellant-Defendant. The Courts in this State have consistently held that the negligence of the attorney is chargeable to the client.

Casper v. Lee, 245 S.W. 2d 132 (Mo. Sup. Ct. en banc, 1952). A default judgment was taken, but a motion to vacate and set aside the default, filed more than thirty days after the entry of the judgment, was sustained. Defendant's lawyer had failed to file a pleading. The Supreme Court held that the defendant was chargeable with the negligence of his lawyer in permitting a default judgment to be entered. The Court reversed the order setting aside the judgment and reinstated the judgment.

In Interest of R., et al., 362 S.W. 2d 642 (Springfield Ct. App., 1962). In this case notice of appeal on a judgment was filed exactly sixty days after the rendition thereof, when the then controlling statute called for a thirty-day period. The Springfield Court of Appeals held that they could not enlarge the period within which an appeal may be taken. The timely filing of notice of appeal is the "vital step" and an "essential prerequisite" to appellate jurisdiction. "The negligence of an attorney is the negligence of his client . . . as was settled at an early date and has been demonstrated in innumerable cases . . . we have no alternative other than to dismiss the appeal." l.c. 644.

The Rules of Civil Procedure refer to "culpable negligence". Appellant-Defendant, in its Suggestions, previously referred to, seeks to define culpable negligence by citing a case involving

criminal procedure in the State of Missouri. The writers have been unable to find a definition of culpable negligence in any civil case in Missouri, but both Black's Law Dictionary and Corpus Juris Secundum define the words as follows:

> Black's Law Dictionary, Fourth Edition, 1951, defines the word "culpable":
>
> > "*Culpable*. Blamable; censurable; involving the breach of a legal duty or the commission of a fault. The term is not necessarily equivalent to 'criminal', for in present use, and notwithstanding its derivation, it implies that the act or conduct spoken of is reprehensible or wrong but not that it involves malice or a guilty purpose. 'Culpable' in fact connotes fault rather than guilt."
>
> Corpus Juris Secundum, Volume 25, Page 28 through and including Page 30, defines the phrase "culpable neglect":
>
> > "*Culpable Neglect*. Any neglect that is censurable; blameworthy; the neglect which exists when the loss can fairly be ascribed to one's own carelessness, improvidence, or folly; failure to make reasonable inquiry. . . . It is a culpable want of watchfulness and diligence, unreasonable inattention and inactivity; the lack of due diligence; . . . where a party loses a right through his own carelessness rather than through the fault of another."

Certainly, Mr. Bucci's testimony regarding inaction and delay of the Appellant-Defendant herein, come so far within the purview of the above definitions that there should be no doubt in the minds of this Court that Appellant-Defendant cannot bring itself within Rule 81.07, Missouri Rules of Civil Procedure, to secure this special relief reserved for blameless and meritorious defendants who, through no fault of their own, have been defrauded of their rights. If there can be any doubt remaining

as to Appellant-Defendant's culpable negligence, Respondent-Plaintiff attaches herewith as exhibits (Respondent-Plaintiff's Appeal Exhibits Nos. B-1, B-2 and B-3, respectively) the Affidavits of Ross G. Lavin and Daniel C. Aubuchon, two of the attorneys for Respondent-Plaintiff, and Mrs. JoAnn Saputo, secretary to the aforesaid attorneys, relative to a telephone conversation between Mr. Robert Bucci and Mr. Ross G. Lavin, on November 9, 1973, when the time to appeal had expired. Clearly, Mr. Bucci's complete lack of any affirmative action, indeed his complete inaction, can only be characterized as a "reckless disregard of the consequences of his omission" to do something. Or, in simple language, culpable negligence.

Previously filed herein, Plaintiff's Appeal Exhibit No. 2, is the Opinion of Judge Buder in overruling Defendant's First Amended Motion to Set Aside the Default Judgment and to Quash the Execution Issued. Same thoroughly exposes the Appellant-Defendant's culpable negligence in completely ignoring the law, rules and procedure of the State of Missouri.

Finally, Respondent-Plaintiff respectfully contends that because this Court has violated its own Rules in granting Appellant-Defendant's Motion for a Special Order, Respondent-Plaintiff will lose the benefit of his judgment, if even for a relatively brief interval, can never be restored whole, and will incur expenses relative to the appeal, all of which is a violation of due process of law in violation of Respondent-Plaintiff's rights guaranteed to him by the Constitution of the United States of America and State of Missouri, and all of which would be unnecessary if this Court would recognize that it cannot accept jurisdiction over that which it clearly and unequivocally does not possess.

Conclusion

Respondent-Plaintiff respectfully submits that Appellant-Defendant's Appeal be dismissed:

First: Because this Court lacks jurisdiction over the Appeal;

Second: Because the Record of this case and the testimony of Appellant-Defendant's own witness convicts it of procrastination, neglect, unreasonable inattention and inactivity, lack of diligence and most importantly, culpable negligence;

Third: Because to permit an appeal in this situation, where this Court has ignored its Rules and assumed jurisdiction when it clearly cannot do so, violates the due process clauses of the Constitution of the United States of America and State of Missouri.

Respectfully submitted

/s/ AUBUCHON & LAVIN
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
621-1575
Attorneys for Respondent-Plaintiff, Lester L. Fulton

Certificate of Service

The undersigned hand delivered a copy of these Suggestions to the office of the attorneys for the Appellant-Defendant, on this 4th day of April, 1974, at 1:30 o'clock P.M.

/s/ DANIEL C. AUBUCHON

Chronology of Events

1973

Mar. 15 Petition filed—Circuit Court, City of St. Louis, Missouri.

Mar. 16 Defendant served. (Personal Service on Defendant's Registered Agent, C. T. Corporation System).

June 5 Certified Letter to Defendant advising that a default would be taken unless Defendant entered its appearance or filed a pleading within ten (10) days.

June 7 Return Receipt relative to the aforesaid Certified Letter.

June 18 Default and Inquiry Granted.

June 28 Hearing on Default. Filing of Memorandum of Law and Facts.

Sept. 19 Interim Order of Court indicating judgment to be entered against Defendant on September 28, 1973.

Sept. 26 Memo from Court to Defendant indicating action to be taken on September 28, 1973. (This was postmarked to Defendant on September 26, 1973, and included the actual amount of the judgment to be entered. This memo was received by Defendant on October 1, 1973).

Sept. 28 Judgment entered—$21,000 actual and $75,000 punitive damages. Memo from Court to Defendant showing actual judgment entered. This was received by Defendant on October 2, 1973.

Nov. 9 Telegram from Plaintiff's attorney to Defendant advising them of issuance of execution and intention to levy if judgment were not paid.

Nov. 14 Defendant's Motion to Set Aside Judgment, Quash Execution and Petition for Review filed.

1974

Feb. 4 Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review filed.

Feb. 7 Hearing on Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review.

Feb. 20 Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review overruled. Court's opinion in this respect is hereto attached and marked Plaintiff's Appeal Exhibit No. 2.

Mar. 1 Defendant's Notice of Appeal to Supreme Court of Order overruling Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review.

Mar. 8 Defendant's Motion for Special Order to File a Notice of Appeal Out of Time filed with Missouri Supreme Court.

Mar. 18 Order of Missouri Supreme Court transferring Appellant-Defendant's Motion to the Missouri Court of Appeals, St. Louis District.

Mar. 21 Receipt by St. Louis Court of Appeals of transcript and exhibits from Missouri Supreme Court.

Mar. 21 Granting by St. Louis Court of Appeals of Appellant-Defendant's said Motion.

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.
No. 36090

Affidavit

State of Missouri
City of St. Louis } ss

Ross G. Lavin, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Respondent-Plaintiff's Appeal Exhibit No. B-3, and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 13th day of March, 1974.

/s/ (Illegible)
Notary Public

My term expires: May 28, 1976.

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.
No. 36090

Affidavit

State of Missouri }
City of St. Louis } ss.

Daniel C. Aubuchon, first being duly sworn on his oath, states

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Respondent-Plaintiff's Ap-

peal Exhibit No. B-3, and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

DANIEL C. AUBUCHON

Subscribed and sworn to before this 13th day of March, 1974.

(Illegible)
Notary Public

My term expires: (Illegible).

Missouri Court of Appeals
St. Louis District

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	No. 36090

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath, states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri, and has been so employed since August, 1964.

2. That on November 9, 1973, at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci, and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

/s/ JO ANN SAPUTO

Subscribed and sworn to before me this 13th day of March, 1974.

/s/ (Illegible)
Notary Public

My term expires: May 28, 1976.

"*Bucci:* I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—it's not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin: It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—it's final.

Bucci: Is there any way it can be opened or anything done about it? What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it.

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing "we have ordered execution."

Lavin: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

Bucci: I can see your side—I guess I screwed up but good. Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are in you in until today?

Lavin: If I am not in, somebody will know where to reach me."

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. I. T. & T. Corporation, Defendant.	}	Cause No. 36962-F. Div. No. 1.

Testimony of: Robert A. Bucci

February 7, 1974.

Reported by: Edsel E. Colvin, C.S.R.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. I. T. & T. Corporation, Defendant.	}	Cause No. 36962-F. Div. No. 1.

Be It Remembered, the above-entitled cause came on for oral proceedings before Hon. William E. Buder, Chief Judge, presiding in Division No. 1, of the Circuit Court of the City of St. Louis, State of Missouri, on Thursday, February 7, 1974, and the following testimony was given by Robert A. Bucci.

For the Plaintiff:	Ross G. Lavin, Esq.
Respondent:	705 Olive Street
For the Defendant:	James Herron, Esq.
Movant:	611 Olive Street.

[*1] PROCEEDINGS

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Robert A. Bucci,
was sworn by the Clerk, and testified as follows:

Direct Examination

Q. State your name for the Court, please? A. Robert A. Bucci.

Q. Where do you reside? A. 12 Washburn Drive, "Simberry" Connecticut.

Q. What is your occupation? A. Attorney.

Q. For whom? A. I. T. I. Communications, Equipment and Systems Division.

Q. Is that the same division by which Mr. "Leach" is employed? A. Yes, sir.

Q. How long have you been an attorney for the C.E.S., Division of I. T. & T.? A. Since July, 1972.

Q. Are you a graduate of a law school? A. Yes, sir.

Q. What law school is that? A. Foreham Law School.

Q. What year? A. 1965.

[2] Q. And are you licensed to practice in the State of Connecticut? A. No.

Q. What states? A. New York in 1966; Massachusetts, 1969.

Q. Are you licensed to practice law in the State of Missouri? A. No, sir.

Q. Have you ever been? A. No, sir.

Mr. Herron: Would you mark these, please?

(Whereupon, the Court Reporter marked Movant's Exhibit Nos. 1 through 17, for identification.)

Q. (By Mr. Herron) Mr. Bucci, when did you first become aware that a lawsuit had been filed against the International Telephone and Telegraph Corporation, your employer, by Mr. Fulton? A. It would have been some time in March. I believe they filed suit around the 14th—14th, within the following week, twenty something, or 26th or 25th, maybe.

Q. Ill show you what has been marked for identification purposes as Movant's Exhibit No. 11, which also bears the designation of Plaintiff's Exhibit 26-28, '73, and ask you to look at that document. Have you seen that document **[3]** prior to today? A. Yes.

Q. When do you recall first seeing this document? A. That would have been shortly after it was sent, whenever it was delivered.

Q. What date is on the document?

The Court: Excuse me. We will have a short recess.

(Whereupon, a short recess was had.)

The Court: You may proceed. Are you ready Mr. Aubuchon?

Mr. Aubuchon: Yes, Your Honor.

The Court: Are you ready, Mr. Herron?

Mr. Herron: Yes, Your Honor.

Q. (By Mr. Herron) Mr. Bucci, I'll direct your attention again to Exhibit No., movant's Exhibit No. 11. I believe your testimony was that you did receive that communication? A. Yes, probably a few days after it was sent.

Q. It makes reference to some conversation that you had had prior to that time with Mr. Lavin,——

The Court: What is the date of that, sir?

Mr. Herron: April 8, 1973, Your Honor.

[4] Q. (By Mr. Herron) Do you recall that you had a conversation prior to that time with Mr. Lavin? A. Yes, 25th, 26th of March, if my memory serves me.

Q. A week or two from the time you were initially served with a summons? A. It would have been within the first day or two that I got the thing. It was received through the corporate trust and went to New York Headquarters office and by the time it worked out to my division it was probably a week to ten days later.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 3. Are you the author of that piece of correspondence? A. Yes, sir, I am.

Q. To whom is it directed? A. Mr. Lavin.

Q. What is the date? A. April 30, 1973.

Q. Mr. Bucci, what experience have you had in the field of litigation? A. Meaning trying cases?

Q. Trial work, yes? A. I have tried one case, a small claim case.

Q. One small claim case?

[5] Mr. Aubuchon: If Your Honor please, I dont know the purpose of extensive litigation experience and I don't think it has a purpose in the record except to prolong it.

The Court: What is the purpose of this?

Mr. Herron: Well, I wanted to bring before the Court this man's experience in the practice of law and what he would know about time periods and things of this sort.

The Court: I know, but Mr. Herron, aren't we getting away, far afield. Now, with all due respect to you and the attorney, and I'm not critical, but here's one of the largest corporations in the United States duly served with a notice, and you get to

their home office, and you're trying to tell me that this man has no experience,—now, that's not critical. I know many good lawyers have no trial experience, but the point is, the corporation is charged with knowledge of legal process and they certainly had trial lawyers, and the fact that this man,—and understand I'm not, I don't mean,—I'm not criticizing you,—but you mean to tell me you're setting up a defense that he was unqualified to pass on this thing or had no experience?

Mr. Herron: Your Honor, I'm trying to bring before the Court the fact exactly who this man is and put that in perspective.

Mr. Aubuchon: You already told us he's a lawyer.

[6] The Court: I have nothing against him. I don't know that he's chargeable with anything.

Q. (By Mr. Herron) Mr. Bucci, I'll show you what has been marked—identified as Movant's Exhibit 4, and I'd ask, would ask you, sir, if you received that correspondence? A. Yes, I did, on or about the date indicated on the correspondence.

Mr. Aubuchon: What is the exhibit number, Jim?

The Witness: June——

Mr. Herron: Exhibit 4.

Q. (By Mr. Herron) Now, then the date on this document, Exhibit 4, is what? A. The date it was sent, June 5th, 1973.

Q. Now, I'll show you what has been marked for identification purposes as Movant's Exhibit No. 14, and ask you, sir, are you the author of the document? A. Yes, I am.

Q. And to whom is that document directed? A. Mr. Lavin.

Q. And you mailed that letter dated June 29th, 1973? A. Yes.

Q. Now, at the time that you mailed that document, Exhibit No. 14, had you had any communication, written or oral, with

Mr. Lavin or anybody in his office during the **[7]** interim from the time you had received exhibit 4 until the time that you mailed exhibit numbered 14? A. In other words, between June 5th and June 29th?

Q. That's right, of 1973? A. I don't recall any to be honest with you.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 15. Did you receive that document in the mail? A. Yes, I did.

Q. When did you receive it? A. I would assume a few days after it was mailed.

Q. Was that in response to the document that you had authored June 29th, Exhibit 14? A. It would seem to me that it was.

Q. Now, did Mr. Aubuchon, the purported author of Exhibit 15, did he include in that letter——

Mr. Aubuchon: I don't know what he's asking did I include in that letter. The letter speaks for itself.

The Court: Just a second. The objection will be sustained.

Q. (By Mr. Herron) Did you receive with this letter, Exhibit 15, and copy of this document entitled Memorandum in Support of Plaintiff's Hearing on Default and Inquiry, June 28, 1973? A. Yes.

[8] Did receive any copy of a document along with that letter indicating that an Interlocutory decree——

Mr. Aubuchon: If Your Honor please, I don't know the reason for the question.

The Court: The objection will be sustained as to the letter, but he can ask whether or not he received anything else other than the letter.

Q. (By Mr. Herron) In this envelope which the letter came in,——

The Court: What he's asking, were there any enclosures with Exhibit No. 15?

The Witness: No.

Q. (By Mr. Herron) Now, from that date—strike that, if you please. Prior to that date, prior to the date that you received Exhibit 15, had you received any copy of that memorandum that I just called your attention to? A. No.

Q. Or any document indicating that an interlocutory decree of default had been entered? A. No.

Q. Now, let's take the period after you received Exhibit 15,——

Mr. Aubuchon: Tell me what Exhibit 15 is?

The Witness: It's a letter from Michael Aubuchon **[9]** to I. T. & T.

Mr. Aubuchon: Go ahead.

Q. (By Mr. Herron) Dated July 2. After that date, and until you received—well, after that date and up to October 1 of 1973, after the time you received Exhibit 15, and all the way up to the time, October 1, 1973, did you receive any copies of that memorandum in support of the plaintiff's hearing on default-inquiry? A. No.

Q. Did you receive anything during the period, any document, correspondence of any sort indicating that an interlocutory decree of default had been entered? A. No.

Q. Or that a final judgment was being entered? A. No.

Q. Did you receive any certificate of the verbal communication from Mr. Aubuchon, Mr. Lavin, or anybody else in that office concerning any, during this period, July 2, on up to October 1, 1973, concerning the action they had taken in taking an interlocutory decree of default, or in filing this memorandum in support of plaintiff's hearing on default-inquiry?

Mr. Aubuchon: Your Honor. I have to object to whether they received any communication from me as **[10]** being outside the perview of this inquiry here. You already ruled on the memorandum.

The Court: Well, I ruled that he could, that the letter speaks for itself, but isn't there a case where it has been decided after a person has been served with process and service is valid that there is no further obligation to notify?

Mr. Aubuchon: Judge, there are many cases to that effect.

The Court: I don't know about how many, but——

Mr. Herron: We plead in the First Amended Motion that when Mr. Bucci received Exhibit 15.

The Court: The only basis on which this could be offered, as I see it, is fraud or misrepresentation.

Mr. Herron: That is the pleading.

The Court: It will be admitted subject to the objection. Read the question back.

(Whereupon, the Court Reporter read the last question in evidence, which is as follows:

"Q. Did you receive any certificate of the verbal communication from Mr. Aubuchon, Mr. Lavin, or anybody else in that office concerning any, during this period, July 2, on up to October 1, 1973, concerning the action they had taken in taken an interlocutory decree of default, or in filing this memorandum in support of **[11]** plaintiff's hearing on default-inquiry?")

The Witness: Shall I answer it?

The Court: Yes.

The Witness: No, sir.

Q. (By Mr. Herron) I'll show you what has been marked for identification purposes, Movant's Exhibit—you'll have to——

(Whereupon, the Court Reporter marked Movant's Exhibit No. 18, for identification.)

Q. (By Mr. Herron) I'll show you what has been marked defendant's Exhibit—Movant's Exhibit No. 18, and Movant's Exhibit No. 16, and ask if you can identify those two exhibits for the Court? A. Yes, I can.

Q. And what are they? A. The first exhibit is a Memorandum for Clerk, dated September 19, 1973. This cause called. Plaintiff appears.

Q. What is the other exhibit? A. Exhibit 16?

The Court: Read the whole exhibit. It's a short one, Mr. Bucci, please, sir.

The Witness: Memorandum for Clerk, September 19, 1973. Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court **[12]** will rule as follows: On September 28, 1973, Judgment and finding of court in favor of plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of the Court in favor of plaintiff on Count II, in the sum of $75,000.00 as punitive damages.

Filed. Signed by Michael J. Scott, Judge.

Filed September 19, 1973, by Joseph P. Roddy, Clerk.

The Court: Could I see that a minute, sir?

Well, you got this then after the letter from Mr. Aubuchon. Where is that letter? This is the letter marked Exhibit C, June 2, '73, addressed to you, Mr. Bucci?

The Witness: July 2——

The Court: July 2 is the date of the letter, but you, you have, you got the letter prior to the memorandum?

The Witness: Yes.

The Court: Well, at that time, then, there was no Interlocutory Judgment or Default Judgment, was there?

Mr. Herron: Your Honor, I think the record will show that June 13th, the initial default-inquiry was granted Hearing was then on damages.

The Court: There was no judgment, though.

Mr. Herron: There was default-inquiry entered.

The Court: I don't think there is obligation in a **[13]** case like this. I don't know, but at that time it was just a default and inquiry. There was no judgment.

Mr. Aubuchon: That's correct. That's the first communication from the Court after the hearing on default.

Mr. Herron: As I understand the law, an interlocutory decree of default, the question of liability is settled at the finding of the default-inquiry and then the damage inquiry follows.

In this instance, both of those proceedings had pre-dated the July 2nd letter. The minute entries in the file in this case will indicate, I believe, that June 13th is the date, right, June 13th, 1973, default-inquiry granted.

The Court: But no judgment.

Mr. Herron: Just an interlocutory Judgment as I understand it, and the result that occurred at that time has that effect.

Mr. Aubuchon: Judge I do not agree with his——

The Court: I didn't enter the judgment. Judge Scott didn't enter the judgment on December 19th. He said he would enter it on the 28th, is that correct?

Mr. Herron: That's right.

Q. (By Mr. Herron) I'll hand you Movant's Exhibit No. 16 and ask you what that is? A. An envelope in which the last exhibit came to me.

Q. Exhibit 18 came to you? **[14]** A. Yes.

Q. Would you tell the Court what is post-marked as Exhibit 16, the envelope, the post-mark? A. The 26th of September, 1973.

Q. When did you actually receive that envelope with its contents, Exhibit 18? A. Physical received it, to open it, on October 1st, 1973, which would be Monday.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 17, and ask if you received that exhibit? A. Yes, I did.

Q. When did you receive that? A. The following day, on Tuesday, October 2nd.

Q. And the date on that exhibit is what? A. September 28, 1973.

Q. And it's actually recorded, entry judgment? A. Yes. Record judgment and finding on two counts.

The Court: What is that date?

The Witness: September 28, 1973.

The Court: That was the entry of the judgment itself?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Herron) To back up a moment, directing your **[15]** attention to, again to Movant's Exhibit 14, which you testified you sent to Ross Lavin, Movant's Exhibit 15, and you testified that you received that back in response to Exhibit 14, is that right? A. Yes, sir.

Q. What, if any reaction did you have to Exhibit No. 15?

Mr. Aubuchon: If your Honor please,——

The Court: Sustained. Sustained.

Q. (By Mr. Herron) What, if any conclusion did you reach on the basis of Exhibit 15?

Mr. Aubuchon: Your Honor, the same objection.

The Court: Sustained.

Mr. Herron: Your Honor, I'd like to make an offer of proof in the record. The witness if allowed to answer that question, his testimony would be,——

Mr. Aubuchon: Your Honor. There is another way getting it.

The Court: Make your offer of proof.

Mr. Herron: ——would be that he concluded from Exhibit No. 15, that the action threatened in Exhibit No. 4, had, in fact, not occurred, and had been withdrawn. I think this is relevant.

The Court: Is there an objection to it?

Mr. Aubuchon: Well, which letter is he referring to, Judge?

The Court: He's referring in his offer of proof **[16]** to the conclusion of this witness.

Mr. Aubuchon: Because of these two letters?

Mr. Herron: These three letters.

Mr. Aubuchon: Of course I object, most strenuously, Judge.

The Court: Sustained.

Q. (By Mr. Herron) Directing your attention again to Movant's Exhibit No. 4, and I'll ask you, Mr. Bucci, when did you become aware that the plaintiff's attorney had taken the action threatened in Exhibit No. 4? A. On October 1 when I received the first, the piece of correspondence from the court dated September 29th—which exhibit is that?

Q. Exhibit 18? A. Yes.

Q. Which you testified you received on October 1st? A. Yes, right.

Q. Do you recall when you employed my law firm, Lewis, Rice, to represent I. T. and T.?

Mr. Aubuchon: If Your Honor please, that has no place in the inquiry.

The Court: I'll let it in subject to your objection. I'd like to know when they employed them, not that I think it's material, but I'd like to know. To be very frank, **[17]** I'm beginning to wonder if it's safe to own I. T. & T. stock, if everything is handled this way. Put that on the record.

Q. (By Mr. Herron) Would you tell His Honor,——

The Court: You can tell the President of your company that I'm not blaming you personally.

Q. (By Mr. Herron) Would you tell His Honor what date you contacted and employed my law firm, Lewis, Rice, Tucker, Allen and Chubb, to represent I. T. & T. in this matter? A. November 9, 1973.

The Court: Had the thirty days expired?

Mr. Herron: Yes.

The Court: All right.

Mr. Herron: I have no further questions of this witness, Your Honor. I wish to offer in evidence,——

The Court: Well, they will all be admitted except to the specific objections which I ruled out. The other matter will be admitted, subject to plaintiff's objections and the Court's reservation of the ruling. Some of them I sustained where they were conclusions or I thought it was clearly outside the record. I considered that.

Mr. Herron: But all other exhibits marked Movant's Exhibits admitted except those specifically——

The Court: Sent to me. Judge Scott went out of **[18]** the way to even notify them. I don't there there was any obligation on him to notify them, and because I. T. & T. sees fit to—Mr. Bucci, who is in no position to handle these things. He's not a Missouri

lawyer, and he knows nothing about Missouri procedure, but to permit this to be accomplished is beyond comprehension to me. If you had some poor ignorant person on the street and not have an education, or no knowledge of the law, and probably had to be lead up to the Legal Aid Bureau, I'd understand some of this, but they are one of the largest corporations, and they were, they certainly had over and above the certification of process, Mr. Herron. They had knowledge and they certainly knew enough about business to know that they would need local counsel, but it's a little hard—be that as it may—I'm not deciding it, but it is——

Mr. Herron: It's our position they had no notice this was——

The Court: Let's get on. I didn't mean to say I've decided it.

Mr. Aubuchon: May I ask a few questions?

The Court: You certainly may. Have you concluded?

Mr. Herron: Yes.

Cross-Examination

By Mr. Aubuchon

Q. Mr. Bucci, to summarize your testimony here today, **[19]** as I understand it, from the date of Mr. Lavin's letter to you on June 5th, up until November 9th, you did exactly nothing about this lawsuit, so far as employing local counsel or doing anything about it? Is that correct? A. As far as employing local counsel, yes. As far as calling, no, because I did during the week of October 1st, some time within the days of October 1st through the 5th, whatever the Friday was, I believe, placed two calls, one for Mr. Lavin and one for Mr. Aubuchon, neither one which was around.

Q. All right. Would a letter notifying that a default would be taken unless a responsive pleading—did you know what a default meant? A. Yes.

Q. And you did nothing about it? A. What time period, sir?

Q. At any time up until now? A. I wrote to him on subsequent exhibits, on July—June 29th.

Q. Saying that you were going to be out of town? A. Right.

Q. To which I responded that, to call me, I was handling the matter? A. That's right.

Q. That was in July? **[20]** A. Yes.

Q. And there was a time period of some several weeks, was there not, between the two letters? A. Yes.

Q. And you still did nothing about it? A. Correct.

Q. And you received these notices from the Court and you still did nothing about it? A. I wouldn't—well, I did not retain counsel.

Q. You did nothing about it, did you? A. I told you I called twice. I called——

The Court: There is no need to belabor this point. Could I ask this?

Examination by the Court

Q. You say you are licensed to practice in Massachusetts. Where is your office located, Connecticut? A. Yes, sir.

Q. Do they have default proceedings in Massachusetts when no answer is filed in a case, Mr. Bucci? A. I guess they would, but I don't know the exact details. I'm sure they would.

Q. You said, I believe, you are also licensed to practice in New York? A. Yes, sir.

Q. Do they have a procedure for default judgments to your knowledge? **[21]** A. Yes, sir.

Q. How large is your office, the legal department, over there? A. Where I work?

Q. Yes? A. One man, me.

Q. Is that the main office? A. No, it's a small division.

Q. Could I have that file? Where is the main legal department of International Telephone and Telegraph Corporation? A. That would be 320 Park Avenue, New York City.

Q. Do they have a legal department? A. Yes, sir.

Q. Why wasn't this directed to their law department rather than you, sir? A. It was initially through the corporate, the papers were initially received through corporate trust, to the 320 Park Avenue address, the secretary's office, and then forwarded via internal route.

Q. Who forwarded it to you? A. I think it came through Attorney John McCord's office.

Q. John McCord's office? **[22]** A. An attorney for I. T. & T.

Q. I want to know how Mr. McCord operates. He sent it on to you in Connecticut, in a one-man office? A. With a letter.

Q. Well, how many lawyers does McCord have down there? A. I just don't—I don't know how many he has, or how many I. T. & T. has down there. I just don't know.

Q. Have you ever been down to that office in New York? A. Yes.

Q. How many would you estimate he had? A. Personally I don't know.

Q. He has more than—let's see, 10 or 12 assistants? A. Well, he's not in charge of the entire legal department.

Q. That's what I'm trying to find out. As far as lawyers, at 320 Park, there's a lot of them? A. Twenty, thirty. I don't know.

Q. I understand, all different types of litigation which concerns a phone company, such as anti-trust suits, franchises, and all those other things, but they certainly would have a litigation section, wouldn't they, aren't most of those New York law offices divided into corporate sections? A. Yes.

Q. Taxation, probate and litigation. That's the primary division into sections, is that not correct? **[23]** A. I would say that's normal procedure. I'm not thoroughly familiar with the breakdown, but they do have certain people who handled those certain specialities.

The Court: Do you have any other questions?

Mr. Aubuchon: Your Honor, I do want to say to young Bucci here, I'm not trying to hurt you, I don't want to hurt any lawyer, but you did have a conversation with Ross Lavin after I wired you about this execution, and the time was along about 2:00 o'clock on Friday, November——

A. November 9th.

(By Mr. Aubuchon)

Q. Do you recall that conversation? A. Yes.

Q. Would you tell the Court what you said and what he said? A. I can just recall the general gist of it without specifics.

Q. Fair enough? A. The general gist, I had received, I think, a Western Union Telegram.

Q. Signed by me? A. Yes, sir.

Q. Saying that judgment was final and entered and that going to execute on property. Please advise whether you intend to satisfy the execution or make—— A. In response to that I placed a call to your office.

[23A] Q. And what did you say? A. I probably said, what's going on, as I came on the phone.

Q. Did you say that you just received a call from Western Union relative to a telegram? A. Yes.

Q. And did you say that I guess I have been derelict as hell in this whole thing? A. Again, I can't remember it word for word.

The Court: Wasn't that the wrong name, derelict. It was negligence, if anything, attributable to the New York office in forwarding it to him.

Mr. Aubuchon: I don't wish to embarrass this boy any further.

The Court: To your knowledge, Mr. Bucci, does International Telephone and Telegraph Corporation have any property in the State of Missouri?

The Witness: Now, yes.

The Court: Yes?

The Witness: Yes.

The Court: Operate in the State of Missouri?

The Witness: Yes.

The Court: Did you say yes?

The Witness: Yes.

[24] The Court: Would you have any estimate as to their holdings?

The Witness: No, sir.

The Court: Are they extensive? What operations do they have here?

The Witness: As far as I know, the major operation, I think it's a subsidiary, not a division as I. T. & T. Blackburn—I don't know what they make.

The Court: It's manufacturing?

The Witness: If I had to guess I would say yes, Your Honor. I'm not sure what the product it.

The Court: All right.

The Witness: They have plants, I believe.

The Court: Where is the plant, do you know?

The Witness: I think—I subsequently found out that it's around the general area of the county.

The Court: In St. Louis County?

Mr. Herron: Yes.

The Court: All right. I have no other questions of this young man.

Mr. Herron: I have no other questions.

The Court: Thank you Mr. Bucci.

(Witness excused.)

[25] **Certificate of Reporter**

I, Edsel E. Colvin, a Certified Shorthand Reporter, do hereby certify that I was the Official Court Reporter in Division No. 1, of the 22nd Circuit Court of the State of Missouri, located in the City of St. Louis, State of Missouri, at the time the foregoing proceedings were had, and I further certify that the foregoing twenty-four pages is a complete and accurate transcript of the witness, Robert A. Bucci, taken on February 7, 1974.

/s/ EDSEL E. COLVIN
EDSEL E. COLVIN, C.S.R.
Official Court Reporter
Division No. 1, Circuit Courts
City of St. Louis
State of Missouri

APPENDIX F

RULES OF CIVIL PROCEDURE

8107 When Party May Appeal After Time for Filing of Notice Has Expired

(a) *Appeal by Special Order—Motion—Notice.* When an appeal is permitted by law from a final judgment in the trial court, but the time prescribed for filing the ordinary notice of appeal with the clerk of the trial court as set forth in Rule 81.04 has expired, nevertheless a party seeking reversal of such final judgment may file a notice of appeal in the trial court, within 6 months from the date of such final judgment, if permitted to do so by a special order of the appropriate appellate court. The special order may be allowed by the appellate court, upon motion and notice to adverse parties, and upon a showing by affidavit, or otherwise, that there is merit in the appellant's claim for the special order and that the delay was not due to appellant's culpable negligence. When notified of the issuance of a special order by the appellate court the clerk of the trial court in which the final judgment was entered shall permit the appellant to file a notice of appeal within 10 days after such notification and the appellant shall then proceed to prepare the transcript on appeal as if the appeal had been allowed without a special order.

(b) *Power to Issue Stay—Supersedeas in Special Appeals.* When an appeal is taken after a special order the power to issue a stay is lodged exclusively in the appellate court, which may in its discretion decline to issue a stay or may issue a stay upon such terms with respect to a supersedeas bond as may be appropriate, and in general accord with Rule 81.09. The supersedeas bond shall be filed in the trial court and the sureties therein shall be subject to the jurisdiction of the trial court as indicated in Rule

81.11. If a final judgment in the trial court is reversed or modified by the appellate court such reversal or modification shall not affect the rights of any person, not a party to such suit, acquired in good faith after expiration of the time prescribed for taking an appeal without a special order, but before the filing of the notice of appeal by special order.

(Adopted Feb. 1, 1972, effective Sept. 1, 1972.)